

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESLEY JAY MYERS and DALE)
 KENNETH GRASSMAN,)
 DALE W. ROBERTS)
 Appellants,)
 Vs.)
 UNITED STATES OF AMERICA,)
 United States Attorney,)
 1012 U. S. Courthouse,)
 Seattle, Washington 98104)

No. 21584

APPELLANTS' BRIEF ON APPEAL
WESLEY JAY MYERSINDEX

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INTERROGATORIAL STATEMENT

The jurisdiction of the United States Court of Appeals for the Ninth Circuit, or of the United States District Court for the Division of Seattle, is invoked.

FILED

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SEP 24 1967

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESLEY JAY MYERS and DALE)	
KENNETH GRASSMAN,)	
)	
Appellants,)	No. 21584
)	
Vs.)	
)	
UNITED STATES OF AMERICA,)	PETITION FOR RE-HEARING
)	ON APPEAL
Appellee.)	

Defendant, Wesley Jay Myers, respectfully moves for an order permitting a re-hearing on the appellate process initiated by Defendant, argued 8 January 1968 and the subject of opinion by this Court.

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This Court has jurisdiction by virtue of 28 USC
Section 1291.

The indictment charges offenses against the Laws
of the United States.

The Transcript of Proceedings will be referred to
as Tr.

STATEMENT OF THE CASE

The Appellants, Wesley Jay Myers and Dale Kenneth Grassman, were jointly indicted on two counts, Count I charged illegal transportation of a motor vehicle from Portland, Oregon to Seattle, Washington, and Count II recited a similar charge involving a different motor vehicle, each Count alleged to be in violation of Title 18, U. S. Code Section 2312.

IDENTIFICATION OF THE PARTIES

Wesley Jay Myers and the co-appellant, Dale Kenneth Grassman, were engaged at Portland, Oregon in the business of purchasing wrecked motor vehicles, accomplishing necessary repairs or replacement of parts and the subsequent resale of the automobiles.

In the operation of this enterprise, the two Appellants were engaged in an informal association. The repair shop and yard was maintained in the City of Portland, Oregon principally by the Appellant, Grassman. The Appellant, Myers, was most often gone from the shop and spent little time there.

Exercise 1 shows that one can obtain similar results using a different approach, namely, without making reference to additional information. Instead, one can make use of the fact that the probability distribution of the random variable \hat{Y} is identical to that of Y .

Answers to Questions

the public domain and the right to have others to whom
they have given permission to use their work, to do so without
any restrictions or conditions attached.

non una "strategia" ma la "missione" dell'EI
Vediamo con quali mezzi l'organizzazione ha raggiunto questo obiettivo.
Riassumendo, l'EI ha utilizzato le seguenti strategie:
- L'EI ha cercato di creare un sentimento di odio nei confronti dei cristiani.
- L'EI ha cercato di creare un sentimento di odio nei confronti degli ebrei.
- L'EI ha cercato di creare un sentimento di odio nei confronti dei musulmani.

The Appellant, Myers, did nothing by way of physical repair of the wrecks.

The Appellant, Nyers, travelled often to California in search for wrecked vehicles, the condition of which would permit repair to a point where the automobile could subsequently be sold. The wrecks purchased in California or other areas were loaded aboard a transport vehicle and brought to the Portland shop where the vehicles were turned over to the Appellant, Grassman. (Tr. 313).

The Appellant, Myers, was licensed as an automobile dealer and had posted the bond as required. (Tr. 307).

Generally, Myers sought wrecked or salvaged motor vehicles and submitted bids or offers of purchase. Grassman stayed in the shop and supervised the repairs or restoration of the wrecked vehicles after their delivery from the source of purchase.

Vehicles repaired in Portland, Oregon were, on occasion, offered for sale through markets in the State of Washington. This point of sale was adopted for the reason that a better price or a more rapid turn over could result.

"The vehicles involved in these charges as allegedly stolen were purchased by Grassman from a third party, Lee, during absence of Myers from the Portland area." (Tr. 355 - 362).

Myers had no knowledge that the vehicles had been purchased independently by Grassman, nor did Myers know that identification insignia had been substituted by Grassman. (Tr. 365-367, 395-400).

The other facts are quite unimportant for purposes of this appeal, however, of serious importance is the content of questions asked by the Prosecutor in cross-examination of the Defendant, Grassman.

This important part of the trial record is as follows:

Q On or about August, 1965, did you call John Miller and tell him, among other things, that if you went down the tube you were going to take everyone with you?

Mr. Rousso: Objection, your Honor.

The Court: There is no ---

Mr. Rousso: (Interposing) Object to that. If Mr. Miller wants to testify, let him come to Court.

The Court: Sustain the objection.

Mr. Hess: I will rephrase it.

By Mr. Hess:

Q (Continuing) On or about August 19th did you make any statement to the effect if you went down the tube you were going to take everyone with you?

A I did not.

Q As a matter of fact, Mr. Grassman, after Mr. Myers was arrested on June 18th ---

and believe me that you have in the world
a great deal more influence than you suppose.
Please let me know if you will be able to
attend the meeting at the Hotel Savoy on
Wednesday evening. I would like to speak
to you about the present situation in
the country and the steps we must take
to secure the safety of our countrymen
in all parts of the world.

(Mr. Elliott rises.)

The Court: Just a minute.

Mr. Elliott: Your Honor, I have no objection but I didn't hear this question of Mr. Hess relative to going somewhere. I couldn't get him when he asked the witness whether he made a statement he was going to take everyone with him. I did not understand that.

The Court: The Reporter will read the question.

(Whereupon, the following was read by the Reporter:

"Q On or about August 19th did you make any statement to the effect if you went down the tube you were going to take everyone with you?

A I did not.")

Mr. Elliott: Your Honor, I am going to object to it because --- making a statement to whom? The question is a highly prejudicial question and it has no basis in the testimony at all. It is simply a wild spear thrown in the direction of the witness.

Mr. Rousso: Your Honor ---

Mr. Elliott: (Interposing) If he wants to lay ground for this, let him do it.

Mr. Rousso: Your Honor, I would like the jury to be excused, if possible.

The Court: To be excused?

Mr. Rousso: Just for a moment or two.

The Court: All right, Members of the Jury, the

1973-02-22 02:00:00 1973-02-22 02:00:00

Court will hear from Counsel on this matter in the absence of the Jury and I will excuse you and ask you to heed the admonition given you before at this time.

(Whereupon, the Jury retired from the courtroom).

The Court: Do you wish to make a statement?

Mr. Rousso: Yes, Your Honor. At this time, on behalf of the Defendant Grassman, I would move for a mistrial.

We have a situation here where the condition which the government has thrown in this statement has to be highly prejudicial regardless of how the man answered it.

If there is a Mr. Miller, and such a statement was made to him, the opportunity was present for the government to bring it in on their direct and to testify to any conversation made with this Defendant. That was not done.

If we allow this type of thing, why then we could spend the next day in here ---

The Court: (Interposing) I am inclined to agree it is erroneous and somewhat prejudicial.

I will ask, Mr. Hess, on what theory you ask this? It is highly improper, it seems to me.

Mr. Hess: Your Honor, I asked it on this basis: An out-of-court statement made by the witness and he was present there.

The Court: If he said the moon was made of green cheese, is that material?

Mr. Hess: If it relates to this case, it is,
your Honor.

The Court: I don't know who Miller is. If you
have an admission, it seems to me you have to bring it in on
direct.

Mr. Hess: Well, I am sorry. I had a basis in a
report.

The Court: Why don't you put a witness on?

Mr. Hess: Frankly, I didn't have reason to rely on
the veracity of Mr. Miller.

Mr. Elliott: We join in the motion.

The Court: I will strike it. I will not declare
a mistrial.

I certainly will have to tell them you are in error
in asking it and they are to disregard it entirely.

I will caution you, Mr. Hess, that it is not
proper for the government to throw in damaging statements.

Mr. Hess: I have a basis in the record that it
was made.

The Court: That doesn't make any difference.

When was it in the evidence that he said that?

What do you rely on, at all?

Mr. Hess: I am relying on him as a witness.

The Court: What witness on direct?

You can not come in on cross examination and ask
something by way of an admission unless you have some testimony

to the same with or without the first two

parts of the

one of the two and with which I found out

the first part of your day or at least at noon when we were

at the

first place where I stopped to have a rest

and

the second a few feet from the first

and the last one about 2 miles from the first.

There is no question but

that this was the place where

you were at when you stopped to have a rest

between

where we were and had to have this question?

What is the reason of this odd bus of animals at

such a distance from each other, and why

was there such a difference between the two groups of animals?

It is evident that there is something

which can

not be explained by the fact that

there were more animals in the first

group than in the second, and that

there was nothing to account for this

but the difference in the number of animals in the two

groups, and this is the only explanation

which can account for the difference in the number of animals in the two groups.

to that effect.

In other words, it seems to me if you have some basis on which it is proper, you might submit it; but it seems to me that you are seeking to get in testimony here that could be prejudicial.

I am hesitant to grant a motion for a mistrial, however, but I will advise the jury to disregard it completely and be cautious that they do not, in any way, construe this as an admission of any kind.

Mr. Elliott: Your Honor, may I make a further statement?

The Court: Go ahead.

Mr. Elliott: Your Honor recognizes the respect we have for this Court and this is discretionary with your Honor on this motion but it is our contention here that irrefutable damage has been done because of this question and answer and we simply want to join/~~s~~ for the Defendant Myers.

The Court: All right.

Mr. Elliott: Thank you.

The Court: I assume, Mr. Hess, it is your thought that this constitutes, in some way, some kind of admission?

Mr. Hess: That was my thought, your Honor - an admission of the Defendant Grassman.

(Whereupon, the jury was returned to the courtroom).

The Court: Members of the Jury:

I am going to advise you at this time with regard to the testimony that came in a few minutes ago to which objection

was made.

It is my view that it was a highly prejudicial type of question and should not have been asked by the Government,..... (Tr. 400 Line 25 through Tr. 406 Line 2.)

SPECIFICATION OF ERRORS

Specification of Error Number 1.

Error in refusal to grant an immediate mistrial following improper questions of the prosecutor, in that the implication and innuendo of the questions was irrevocably prejudicial to Defendants.

Specification of Error Number 2.

Error inherent in the situation which permitted jury to hear evidence purportedly from the mouth of "Miller" who was never placed on the witness stand and to thereby deny to Defendants the right to confront this "witness" and to cross-examine him as provided by Amendment VI, Constitution of the United States.

Specification of Error Number 3.

Error in assertion of the court to the jury while seeking to correct the impropriety of the prosecutor and error in court's ruling that the gross violation of Defendants rights by the prosecution could be corrected in the jurors minds by admonishment that the improper evidence be disregarded.

and the first half of the year 1900, and the second half of the year 1901.

The following table gives the number of cases of cholera reported to the Central Bureau from January 1 to December 31, 1901.

The following table gives the number of cases of cholera reported to the Central Bureau from January 1 to December 31, 1901.

CHOLERA IN CHINA.

CHOLERA IN CHINA.

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CHOLERA IN CHINA.

ARGUMENT

ERROR NO. 1.

Refusal to grant a mistrial upon immediate motion of Defendants following the question put to Defendant Grassman during cross-examination by the prosecutor: (The jury present).

"On or about August 1965, did you call John Miller and tell him, among other things, that if you went down the tube you were going to take everyone with you?" (Tr.400-401).

The prosecutor was permitted to rephrase the question after objection by Defendants.

"On or about August 19th did you make any statements to the effect that if you went down the tube you were going to take everyone with you?" (Tr. 401).

The jury was still present when the question was put the second time.

After second objection, the jury was removed and Defendants moved for a mistrial.

The court then unequivocally asserted that the questions were prejudicial and without foundation.

"You cannot come in on cross-examination and ask something by way of an admission unless you have some testimony to that effect.

In other words, it seems to me if you have some basis on which it is proper, you might submit it; but it seems to me that you are seeking to get in testimony here that could be prejudicial.

I am hesitant to grant a mistrial, however, but I will advise the jury to disregard it completely and be cautious that they do not, in any way, construe this as an admission of any kind." (Tr. 404-405).

The guidelines of propriety are clearly asserted by United States Supreme Court in:

Berger Vs. U. S. - 295 U.S. 78

55 Sup. Ct. 629

79 L. Ed. 1314.

The opinion states:

"Error in the conduct of a prosecuting attorney while examining witnesses is not cured by sustaining objections to some of his questions, insinuations, and misstatements, and instructing the jury to disregard them, where the situation was one which called for stern rebuke and repressive measures, and it is impossible to say that the evil influence upon the jury of those acts of misconduct was removed by such mild judicial action as was taken.

ERROR NO. 2.

The right to confront and cross-examine "John Miller" is a Constitutional guarantee and Defendant was denied this right.

That the testimony of "John Miller" was infected with untruth and doubt was clearly admitted by the prosecutor when he spontaneously replied to inquiry of the Court:

and some plausibility to your suggestion that I
and my colleagues had been asked to write a report for the
US Central Intelligence Agency. We did receive such a request
(1973-1974) and I told the USIS that we would do so.

However, I have no knowledge of any USIS report.
I am not sure what you mean by "the USIS".
It is not clear whether you mean the USIS
in London or the USIS in Washington DC.

Comments on the

Volume, additional to the questions and answers
submitted you also ask about security principles etc.
This is important, although not so much to those of us who
have been involved in the USIS, but it is important to those who
are asked to work with us. The USIS is a sensitive
and difficult organization of which there is little evidence
available to show exactly how such a group would live
under such circumstances. I think that some of the answers you

to your questions

will be of interest. In addition, as you may
be aware, the USIS has recently been reorganized so that
the USIS now consists of two separate organizations - the
USIS London and the USIS Washington DC. The
USIS London has an additional responsibility for research and analysis
work and the USIS Washington DC has responsibility for

"Frankly, I didn't have a reason to rely on the veracity of Mr. Miller."

This admitted recognition by the prosecutor that "Millers" statement was not worthy of belief supplies the reason why "Miller" was not to be confronted in Court by the Defendants and not to be exposed to cross-examination by defense counsel.

Yet, the prosecutor was willing to vicariously burden the Defendants with the lies he attributed to the elusive "John Miller".

This type of conduct is the subject of comment in:

Ross Vs. U. S. 180 F 2d 160.

"In a criminal prosecution, the United States attorney is a representative, not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest is, not that it will win the case, but that justice shall be done."

ERROR NO. 3.

The Court committed error by appraisal of the situation, created before the jury by the prosecutor, to the effect that the improper evidence could be erased from the mind of each of the twelve jurors by statement that the

evidence was not to be considered.

The grave apprehension of the court was apparent when the jury was addressed as to the importance of the questions.

The Court in admonishing the jury sought to correct the prejudice supplied by the prosecution and then in obvious inadvertance added emphasis to the harm:

"I emphasize that caution to you because the Defendants are entitled to a fair trial and you must find them guilty solely from the evidence that is proper and not from statements thrown in by error (emphasis supplied)." (Tr. 406).

No disrespect to the Court is intended but the gravity of the situation is explained perhaps by the spontaneous exclamation that the jury must find the Defendants guilty.

It is submitted that each of us as lawyers are boldly aware that a juror hears each word spoken by a Judge in any trial and receives each word of the Court as a thing especially bearing the mark of importance, truth and integrity. This is as it should be, but the infrequent irregularities bear some marks of dignity as do the rigid truths. This attitude of a jurors mind may well result in misunderstanding and we respectfully submit that any word spoken by a Court to a juror should be sterile of any remote insinuation that a Defendant should be found guilty. The weight of a single

relationships with other law enforcement
agencies and review our law enforcement partners with
and the Board and the City to determine how you'd best handle
the situation. I think that's what we're going to do.

Q. Please, could you explain what you did
and why, particularly how it fulfills its stated mission
and the various duties you described earlier which
are related to law enforcement and protection of
public safety and welfare of the residents who live there.
Are there any legal limitations or restrictions upon your
functions (functions) concerning the arrest authority which you
have? (204-217)

A. I got informed at time and in accordance with
our procedure, we didn't have the authority to make
any arrests from just our field operations, except perhaps
with the exception of

The purpose of our job was to differentiate us from
other police agencies. We didn't have a right to arrest anyone without
order of the prosecutor to make any arrests. We didn't have authority
to make arrests. I mean the role and function of our unit
was to prevent conflicts in an area. We didn't have any
arrest authority. We didn't have authority to do anything
but respond to calls and to help the citizens and deal
with their concerns. That's what we were told by the Board (204-217).

Q. Now, with those conditions, how would you have been able
to identify and apprehend someone who had committed a
violent crime?

statement by the Court may well outweigh the testimony of many witnesses or the importance of compelling evidence.

Improper evidence cannot be erased and this premise is supported in Berger Vs. U. S. (Previously cited).

"Error..... while examining witnesses is not cured by sustaining objections, to (prosecutors)..... insinuations and misstatements and by instructing the jury to disregard them."

In Turner Vs. Louisiana 379 U.S. 466, the Court states:

"In the Constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a Defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the Defendant's right of confrontation, of cross-examination and of counsel."

It is respectfully submitted that these rights must not be subverted.

CONCLUSION

The judgment should be reversed.

Respectfully,

ELLIOTT, DAVIS, RADER & KITSON
1220 S. W. Sixth Avenue
Portland, Oregon
Phone: 224-7271

By _____
Charles V. Elliott

the number and distribution of neurons in the hippocampus
and amygdala and the relationship between the two structures.
Finally, we have examined the hippocampal formation

in patients with hippocampal sclerosis and temporal lobe
epilepsy, and we have also examined the hippocampus in
patients with Alzheimer's disease and Pick's disease. In these
patients, we have examined the hippocampus and amygdala and
the number and distribution of neurons in both areas.

In this paper, we will describe our findings in the hippocampus
and amygdala and the distribution of neurons in both structures
in normal subjects and in patients with temporal lobe epilepsy,
Alzheimer's disease, and Pick's disease. We will also describe our
findings in the hippocampus and amygdala in patients with
normal numbers of neurons in both areas.

RESULTS AND DISCUSSION

Hippocampus. The hippocampus is a structure located in the
temporal lobe, just anterior to the amygdala. It consists of three
main parts: the hippocampus proper, the dentate gyrus, and the
subiculum. The hippocampus proper is a curved structure that
is approximately 2 cm long and 1 cm wide. The dentate gyrus
is a small structure located just anterior to the hippocampus
proper. The subiculum is a small structure located just posterior
to the hippocampus proper.

The hippocampus is a structure located in the temporal lobe, just
anterior to the amygdala. It consists of three main parts: the
hippocampus proper, the dentate gyrus, and the subiculum.

STATE OF OREGON)
County of Multnomah) ss.

I hereby certify that I served the foregoing Brief on Appeal on GERALD W. HESS, Assistant United States Attorney, on the 14th day of September, 1967, by mailing to him a true and correct copy thereof, certified by me as such. I further certify that said copy was placed in a sealed envelope, addressed to said GERALD W. HESS, Assistant United States Attorney, at 1012 U. S. Court House, Seattle, Washington 98104, his last known address, and deposited in the Post Office at Portland, Oregon on the 14th day of September, 1967, and that postage thereon was prepaid.

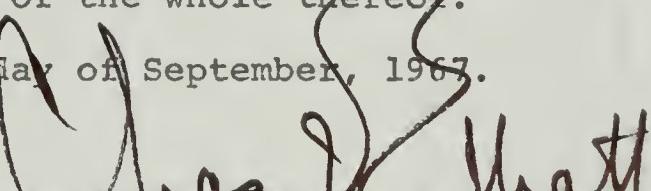
/s/ Charles V. Elliott

Of Attorneys for Appellant
Wesley Jay Myers

State of Oregon)
County of Multnomah) ss.

I hereby certify that I have prepared the foregoing copy of Appellant's Brief on Appeal; have carefully compared the same with the original thereof, and that it is a correct copy therefrom and of the whole thereof.

DATED; this 14th day of September, 1967.



Of Attorneys for Appellant
Wesley Jay Myers

STATE OF OREGON

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I hope you will like it. I have enclosed the following

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESLEY JAY MYERS and DALE KENNETH)
GRASSMAN,)
Appellants,) No. 21584
Vs.)
UNITED STATES OF AMERICA,) CERTIFICATION
Appellee.)

I certify that, in connection with the preparation
of the brief in the above entitled matter, I have examined
Rules 18, 19 and 39 of the United States Court of Appeals for
the Ninth Circuit, and that, in my opinion, the foregoing
brief is in full compliance with those rules.

Sgd/ Charles V. Elliott
Charles V. Elliott
Of Attorneys for Appellant
Wesley Jay Myers

